

THE HONORABLE THOMAS S. ZILLY

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

BUNGIE, INC., a Delaware corporation,

Plaintiff

v.

AIMJUNKIES.COM, a business of unknown
classification; PHOENIX DIGITAL GROUP
LLC, an Arizona limited liability company;
JEFFREY CONWAY, an individual; DAVID
SCHAEFER, an individual; JORDAN GREEN,
an individual; and JAMES MAY, an individual,

Defendants.

Cause No. 2:21-cv-0811 TSZ

**DEFENDANTS' OBJECTIONS
TO COURT'S PROPOSED
JURY INSTRUCTIONS 16,
16(a) AND 16(b)**

Defendants Aimjunkies.com, Phoenix Digital Group LLC, Jeffrey Conway, David Schaefer, Jordan Green and James May, through their undersigned counsel, hereby object to proposed Jury Instructions 16, 16(a) and 16(b) for reasons stated herein.

**“DEFENDANTS’ PROFITS” IS THE SOLE MEASURE OF DAMAGES
TO BE PURSUED BY BUNGIE AT TRIAL**

At this late stage, Plaintiff Bungie, Inc., has confirmed on several occasions that it is no longer seeking statutory damages and that “Defendants’ Profits’ is the sole measure of damages to be pursued by Bungie at trial.

Following the pre-trial conference held on November 17, 2023, Bungie, in an email to Defendants’ counsel dated November 21, 2023 (true and correct copy attached as Exhibit A), stated that Bungie no longer sought to include Mr. Nate Buckmiller as a witness for Bungie at

1 trial. Mr. Buckmiller was originally proposed as a substitute witness to testify regarding, in
2 part, “the harm caused by cheat software, including Defendants’ Cheat Software, to Bungie.”

3 Later that day, this Court later confirmed having received Bungie’s indication that
4 neither Mr. Buckmiller nor Mr. Hodgson, who Mr. Buckmiller was intended to replace, would
5 be witnesses at trial (Exhibit B). On November 27, 2023, Counsel for Bungie confirmed that,
6 “Defendants’ profits will be the only claimed damages at trial” (Exhibit C).

7 In light of these clear, repeated statements, it is beyond dispute that Bungie has
8 represented and agreed that “Defendants’ Profits” would be the *sole* measure of damages it
9 would pursue at trial.

10 **THE PROPOSED INSTRUCTIONS GO BEYOND “DEFENDANTS’ PROFITS”**

11 Proposed Instructions 16, 16(a) and 16(b), as written, not only address but permit the
12 jury to award “actual damages” beyond the “Defendants’ Profits” Bungie has previously
13 stated and agreed would be the sole measure of potential damages.

14 In particular, proposed Instruction 16 states, in part, that should Bungie prove
15 copyright infringement, “Bungie is entitled to recover any ‘Actual Damages’ and any profits
16 of such Defendant or Defendants attributable to the infringement.”

17 Meanwhile, Proposed instruction 16(a) describes in detail “actual damages” that
18 Bungie has already indicated it is not seeking.

19 Finally, Proposed Instruction 16(b) states, in part, that, “In addition to ‘Actual
20 Damages,’ the copyright owner is entitled to any profits of the Defendants attributable to the
21 infringement. You may not include in an award of profits any amount that you took into
22 account in determining ‘Actual Damages.’”

23 Because Bungie is *not* seeking “actual damages” in this case and has clearly indicated
24 that, “Defendants’ profits will be the only claimed damages at trial,” Proposed Instructions 16
25 and 16(b) should be modified to eliminate any reference to “actual damages,” while Proposed
26 instruction 16(a) should be deleted in its entirety as being redundant and unnecessary.

PROPOSED REVISIONS

In view of the foregoing, Defendants respectfully request that Proposed Instruction 16(a) be stricken in its entirety, and that Proposed Instructions 16 and 16(b) be revised and rewritten to remove references to “actual damages” as follows:

Proposed Instruction 16 (revised):

“It is the duty of the Court to instruct you about the measure of damages. By instructing you on damages, the Court does not mean to suggest for which party your verdict should be rendered. If your verdict is for Bungie on its copyright infringement claim as to a Defendant or Defendants, Bungie is entitled to recover any ~~“Actual Damages”~~ and any profits of such Defendant or Defendants attributable to the infringement.

It is for you to determine, based upon the evidence, what damages, if any, have been proved. Your award of damages must be based upon evidence and not upon speculation, guess, or conjecture.”

Proposed Instruction 16(b) (revised):

~~“In addition to “Actual Damages,” the copyright owner~~ If your verdict is for Bungie on its copyright infringement claim as to a Defendant or Defendants, Bungie is entitled to any profits of the Defendants attributable to the infringement. ~~You may not include in an award of profits any amount that you took into account in determining “Actual Damages.”~~

(Remainder of Proposed Instruction 16(b) unchanged.)

CONCLUSION

Because Bungie is seeking on “Defendants’ Profits” in this action and is not seeking any “actual damages” beyond such profits, it would be confusing and inaccurate to provided instructions to the Jury regarding “actual damages” Bungie is not seeking and no longer is free to seek.

For these reasons, Defendants propose and ask that Proposed Instruction 16(a) be stricken in its entirety, and that Proposed Instructions 16 and 16(b) be rewritten as proposed to

1 remove any unneeded and improper references to “actual damages.” Such action by this
2 Court is respectfully requested.

3 Dated December 4, 2023.

4 /s/ Philip P. Mann

5 Philip P. Mann, WSBA No: 28860

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